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LEONG HUAT SAWMILL PTE. LTD.

v.

LEE MAN SEE

FEDERAL COURT, KUALA LUMPUR

b

WAN SULEIMAN FJ

MOHD. AZMI FJ

HASHIM YEOP SANI FJ

[CIVIL APPEAL NO. 105 OF 1983]

18 AUGUST 1984

*c***CONTRACT:** *Logging agreement - Breach - Damage - Equitable estoppel - Contracts Act 1950, s. 26(b).**d*

The respondent entered into an agreement with the appellants to extract timber in seven blocks of forest land. The respondent sued the appellants for breach of contract by failing to pay in full for the services rendered and claimed for (i) a refund of deposit paid (ii) workers' wages from March to May 1979 and (iii) additional wages pursuant to an oral agreement. The appellants counterclaimed for expenses incurred as a result of the respondents's breach of the agreement by abandoning work on two of the seven forest compartments. The trial Judge held that the appellants breached the agreement by sending a letter to the Forest Department requesting for "Closure Report" thus preventing the respondent from completing his part of the bargain and ordered that the deposit be refunded to the respondent and awarded the respondent the wages of the workers from March to May 1979 but dismissed the claim for additional wages.

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The appellants appealed against the decision of the trial Judge. The respondent cross-appealed against the dismissal of the claim for additional damages on the basis that it is covered by s. 26(b) of the Contracts Act and also on the doctrine of equitable estoppel.

Held:*f*

[1] The trial Judge was correct on the evidence that the appellants breached the contract.

[2] It follows then that the appellants' counterclaim was rightly dismissed by the trial Judge since the expenses were incurred as a result of the appellants' own breach of contract.

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[3] Neither the doctrine of equitable estoppel nor s. 26(b) of the Contracts Act has any application in this case because the additional wages that were promised to the respondent are subjected to two conditions and both of them have not been proved to have been properly discharged by the respondent.

[Appeal and cross-appeal dismissed. Each party to bear its own costs.]

Legislation referred to:

Contracts Act 1950, s. 26(b)

*h***Other source referred to:**

Sanjiva Row's Contracts, 7th Edn. 1968, Vol. 1, p. 591

For the appellants - R. Rajeswaran; M/s. Shook Lin & Bok

For the respondent - G. Joseph (Victor Isaacs with him); M/s. Lawrence & Joseph

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JUDGMENT

Mohd. Azmi FJ:

The dispute between the parties arose from a written agreement made in Chinese on 1 June 1972 under which the appellants/defendants engaged the respondent/plaintiff to extract timber in seven blocks of forest land referred to as Blocks A to G containing a total area of 4,500 acres in the District of Paka, State of Trengganu. The appellants were sued by the respondent for damages for breach of contract, and by para. 4, 5 and 6 of the statement of claim, the respondent alleged that he had completed felling timber in the said forest land in March 1979 and in breach of the agreement the appellants had failed to pay in full for the services rendered. Under special damages he claimed a sum of RM88,916.31 which comprised: (i) refund of RM10,031.80 deposit paid by the respondent under the agreement, (ii) RM43,173.63 for wages of workers from March to May 1979, and (iii) RM35,710.88 for additional wages. In their defence the appellants averred that the respondent did not in fact complete the work as agreed in the agreement and that he had stopped work in April 1979 before all the timber in the said forest land had been completely felled and removed and as such the respondent was not entitled to the sum claimed. By way of counterclaim, the appellants sued the respondent for damages in the sum of RM190,148.62 which they had incurred as a result of respondent's breach of the agreement by abandoning work on two of the seven forest compartments. They alleged that they had to pay this sum to two other timber contractors to complete the felling of the remaining trees in the compartments.

On the pleadings, the learned Judge correctly in our view, determined the dispute on the basis of "which party committed the breach of the 1972 Logging Agreement" after logging work in five of the seven compartments had been completed. On the evidence, the learned Judge came to the conclusion that the respondent was free from blame but it was the appellants who were guilty of the breach of the agreement and accordingly he gave judgment for the respondent in respect of refund of deposit and for the wages of workers from March to May 1979. However, he dismissed the claim in respect of extra wages. The appellants appealed against the said decision, whilst the respondent cross-appealed against the disallowance of claim for additional wages.

On the issue of breach of contract, the learned Judge found that a dispute had developed between the parties after the respondent had completed work in Block A, B, C, F and G. The dispute began when the respondent was working in Block D and it continued with greater intensity in respect of Block E. As stated by the learned Judge:

In my judgment the reason for plaintiff's stoppage of work in 'Block E is traceable to his refusal to resume work in Block D. Because of his refusal to go back to log in Block D, the relationship between the plaintiff and the defendant had become strained and finally deteriorated to such an extent that the plaintiff thought it no longer worth his while to continue logging for the defendant. Hence he stopped work in Block E... Thus the dispute between the parties really started as a result of the defendant asking the plaintiff to go back to work in Block D, and his refusal to comply with the request.

The learned Judge gave reasons for his conclusion that the stoppage of work in both compartments was in fact caused by the appellants. In the case of compartment D, the respondent had to stop work because of the letter dated 6 October 1977 sent by the appellants to the Forest Department requesting for "Closure Report" indicating either that logging had been completed or that the appellants were no longer interested in that particular compartment. By taking such action the appellants had made it difficult or even impossible for the respondent to perform his part of the bargain under the agreement. In our

- a* view, the learned Judge was justified in rejecting the appellants' contention that the letter to the Forest Department was sent because they were misled by the respondent. We agree with the learned Judge that the respondent had no hand in writing of that letter and that the appellants were solely responsible for abandoning the forest permit and by doing so they had committed a breach of the agreement. Further under Clause 4 of the agreement, the respondent had to do logging work under the supervision and direction of the appellants.
- b* We find that the learned Judge was correct in accepting the respondent's evidence that he stopped work because he had cut all the trees that had been marked for felling by the appellants. The learned Judge was therefore justified in making the inference from that evidence coupled with the letter sent by the appellants to the Forest Department that the cessation of work by respondent in Block D had been due to the appellants' own conduct. However, the learned Judge accepted appellants' evidence that subsequently the Forest Permit was reissued to them and when they requested the respondent to resume logging he had refused to comply. We think the request was unreasonable since the respondent had already ceased work and his workers had most probably been withdrawn from that area, and as such the refusal by the respondent to resume work there could not constitute a breach of the agreement.
- c*
- d* As regards Block E, we are also in agreement with the learned Judge that on the evidence, particularly the monthly statement of accounts prepared by the appellants that the respondent had stopped work in May 1979 and not March 1979. The contents of the documentary evidence supported the respondent's contention that the pleading in para. 4 of his statement of claim to the effect that he completed logging in March 1979 was an error which could not have taken the appellants by surprise. To interpret the document in any other way would distort the clear contents in the statement of accounts that the figures were for the months to which the statement relates. Thus at p. 93 of the appeal record, when the appellants' account stated "production of 1,142 logs for the month of May" and credited the respondent with RM21,009.71, the credit given must be for the production of logs for May and not for earlier month as suggested by the appellants, notwithstanding the actual date the account itself was prepared. We are in agreement with the learned Judge that the cessation of work in Block E was due to appellants' conduct in making it difficult for the respondent to carry on particularly by delaying payments and even by refusing to pay for money due when demanded in May 1979. We are entitled to take judicial notice of the fact that in logging operation in the jungle, the workers must be paid promptly and although under Clause 12 of the agreement labour charges should be calculated once at the end of each month, we see no reason to disturb the learned Judge's observation that under the agreement payment must be made by the appellants as soon as the amount due to the workers was calculated. Refusal to pay would certainly constitute a serious breach of the agreement. The appeal in this case on the issue of breach of contract is entirely against the finding of facts by the learned Judge. It is our conclusion having regard to the evidence that the findings of fact by the learned Judge are supported by evidence and the inferences made by him from primary facts are also made on correct principle and on reasonable assessment of the evidence. In the circumstances it would be wrong for us to disturb his finding that the breach of the agreement was in fact committed by the appellants. The respondent was therefore entitled to the refund of his deposit and as well as for wages due from March to May 1979.
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- i* As regards the dismissal of the appellants' counterclaim for expenses for having to employ Syarikat Ah Moi (RM79,793.97) and Syarikat Fong Trading (RM110,354.65), this must necessarily follow from the finding of the learned Judge that it was the appellants who

were responsible for the breach of contract and the cessation of work in both Blocks D and E. If at all the appellants had suffered such additional expenses, they must in the circumstances bear the loss themselves since the expenses were incurred as a result of their own breach of the agreement.

The cross-appeal by the respondent against the refusal of the learned Judge to award him the sum of RM35,710.88 for additional wages for six months from December 1978 to May 1979, is the only matter which has caused us some concern. These additional wages were based on an oral undertaking by the appellants to pay the respondent an extra RM1 per ton of logs at the completion of the agreement. For purposes of accounting, the appellants had credited this *ex-gratia* payment in the monthly statement of accounts for the six month period although no money had actually been paid to the respondent. The main thrust of respondent's argument is that although the undertaking to pay was without consideration, it is enforceable under the principle of promissory estoppel. We are referred to a passage in *Sanjiva Row's Contracts*, 7th Edn. 1968, Vol. 1, p. 591 which state:

The idea of promissory estoppel - According to it, the reason for the enforcement of a promise is the justifiable reliance upon the promise. It is wrongful for the promisor, who has aroused expectation in the promisee and induced him to act to withdraw from his promise. In *Finlay v. Swirsky*, the Court said:

Every sufficient consideration contains the substantial elements of an estoppel in pais, for, if a man by his promise induces another to change his position and is then permitted to deny the validity of the promisee, he is thus perpetrating a fraud. The law will not permit this.

We are also referred to Section 26(b) of the Contracts Act 1950 which provides:

An agreement made without consideration is void, unless it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do.

The respondent also argues that after having completed five of the seven logging blocks and since the appellants had already credited in his favour the accumulated sum of RM33,058.39 up to the month of January 1979 (see appeal record p. 81) it is inequitable for the trial Judge not to award the claim for additional wages particularly having regard to the fact that the respondent had been found free from blame for the breach of contract. The respondent's argument certainly contains considerable force, but we must agree with the learned Judge that in this particular case the sum is not payable although the law argued before us on this point was not advanced or properly advanced at the trial. Under cross-examination the respondent (PW2) admitted that "this extra RM1 per ton was not part of the contract but it was agreed that it would be payable at the end of the contract subject to good performance". From this admission, it seems clear to us that the promise to pay the extra wages is not without preconditions. Firstly, it is only payable at the end of the contract and secondly it must be subject to good performance. The first precondition could not possibly be satisfied as the 1972 agreement was never completed. As to the second precondition, for the Court to assume in the absence of proper evidence that there had been good performance would be to fly in the face of the very dispute between the parties which clearly indicated everything was not well as to the performance of the agreement albeit towards the latter half of the contract period. In our view there is no equitable estoppel in this case and nor would s. 26(b) of Contracts Act apply since compensation promised to be paid is subject to two preconditions and both had not been proved to have been properly discharged by the respondent. Section 26(b) refers to a promise to compensate a person

a who has already voluntarily done something for a promisor, or something which the promisor was legally compellable to do. The logging work done by the respondent was not voluntary and nor can the work of extracting timber be described as something which the appellants were legally compellable to do. In our view the promise to pay the extra RM1 per ton cannot come under the purview of s. 26(b).

b Both the appeal and cross-appeal must be dismissed and we order that each party should bear its own costs. The appellants must of course pay the costs in the Court below. The deposit to be refunded.

Also found at [1984] 2 CLJ 157

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